

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

77-6104

To be argued by
LEONARD KOERNER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALFRED KIRSHNER,

Plaintiff-Pro Se-Appellant,

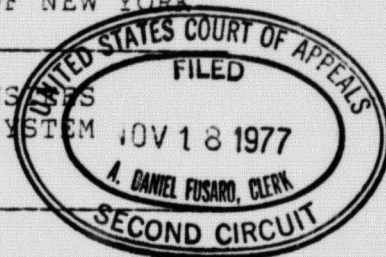
v.

UNITED STATES OF AMERICA, SECRETARY OF
TREASURY, COMMISSIONER OF THE IRS, ALVIN
D. LURIE, in his capacity as Assistant
Commissioner, Employer Plans and Exempt
Organizations, IRS, BERNARD GOLDBERG,
REUBEN MITCHELL, JOSEPH SHANNON, ROBERT
CHRISTEN, VICTOR CONDELLO, HARRISON J.
GOLDIN, JAMES REGAN, individually, and
as Trustees of the Teachers Retirement
System of the City of New York and
ISAIAH ROBINSON, individually as former
Trustee of Teachers Retirement System.

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES, TRUSTEES
OF TEACHERS RETIREMENT SYSTEM



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TABLE OF CONTENTS

Statement.....	1
Questions Presented.....	2
Facts.....	3
Opinion Below.....	7
Applicable Statutes.....	11

Point I

THE INVESTMENTS BY THE TRUSTEES OF THE TEACHERS RETIRMENT SYSTEM IN SECURITIES OF THE MUNICIPAL ASSISTANCE CORPORATION AND NEW YORK CITY SERIAL BONDS, PURSUANT TO THE AMENDED AND RESTATED AGREEMENT, DATED NOVEMBER 26, 1975, DO NO VIOLATE THE PLAINTIFF'S CONSTITUTIONAL RIGHTS UNDER THE CONTRACT CLAUSE, ARTICLE I, SECTION 10 AND UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT	13
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Point II

P.L. 94-236, WHICH LAW CONTINUES THE TAX EXEMPT STATUS OF THE FIVE CITY RETIREMENT SYSTEMS PARTICIPATING IN THE AMENDED AND RESTATED AGREEMENT DATED NOVEMBER 26, 1975, IS CONSTITUTIONAL.....	19
--	----

Point III

THE PLAINTIFF DOES NOT HAVE STANDING TO ALLEGE A CAUSE OF ACTION UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934. PLAINTIFF IS NOT A PURCHASER OR A SELLER OF THE SECURITY, NEW YORK CITY BONDS, WHICH PURCHASE IS BEING CHALLENGED UNDER THE ACT. IN ANY EVENT, PLAINTIFF'S CAUSE OF ACTION SHOULD BE DISMISSED FOR FAILURE TO SHOW ANY MATERIAL MISREPRESENT- ATION OR FAILURE TO DISCLOSE RELEVANT FACTS.....	22
Conclusion.....	26

TABLE OF AUTHORITIES

CASES CITED:

<u>Birnbaum v. Newport Steel Corp.</u> , 193 F. 2d 461 (2d Cir., 1951), cert. den. 343 U.S. 956 (1951).....	22
<u>Blue Chip Stamps v. Manor Drug Stores</u> , 421 U.S. 723 (1975).....	22
<u>Board of Regents v. Roth</u> , 408 U.S. 564 (1972).....	15
<u>Daniel v. International Brotherhood of Teamsters</u> , 46 U.S.L.W. 2119 (August 30, 1977).....	23
<u>Ernst & Ernst v. Hochfelder</u> , 425 U.S. 185 (1976).....	22
<u>Greenstein v. Paul</u> , 400 F. 2d 580 (2d Cir., 1968).....	22
<u>Haberman v. Murchison</u> , 468 F. 2d 1305 (2d Cir., 1972).....	22
<u>New York v. United States</u> , 257 U.S. 591 (1922).....	20
<u>Paul v. Davis</u> , 424 U.S. 693 (1976).....	16
<u>Rippey v. Denver United States National Bank</u> , 260 F. Supp. 704 (D. Col., 1966).....	23
<u>Robinson et al. v. United Mine Workers of America Health and Retirement Funds, et al.</u> , D.C., Dist. Columbia, Civil Action, Docket No. 77-0698, Federal Securities Law Reports, ¶96, 118.....	23
<u>Santa Fe Industries Inc. v. S. William Green</u> , 430 U.S. 462 (1977).....	26
<u>Sgaglione v. Levitt</u> , 37 NY 2d 507 (1975).....	14, 15, 16
<u>Simpson v. Mitchell</u> , Index No. 20061/75, December 1, 1975, N.Y.L.J., p. 8, cols. 4, 5 (Sup. Ct., N.Y. Co.), affd. 53 AD 2d 590 (1st Dept., 1976).....	15, 17
<u>Tron v. Condello</u> , 427 F. Supp. 1175 (S.D.N.Y., 1976).....	14, 15, 20
<u>United Mine Workers v. Gibbs</u> , 383 U.S. 715 (1966).....	16

<u>Westchester Chapter, Civil Service Employees</u> <u>Assoc. v. Levitt, 50 AD 2d 1105 (3rd</u> <u>Dept., 1975), affd. on certified question</u> <u>37 NY 2d 519 (1975).....</u>	14
<u>Women in City Government United v. City</u> <u>of New York, Docket No. Slip. Opinion., at</u> <u>p. 6139, decision dated September 28, 1977.....</u>	16
Applicable Constitutional and Statutory Provisions	
United States Constitution Article 1, Section 10.....	13, 19
United States Statutes 42 U.S.C. §1983..... PL 94-236..... Securities Exchange Act, §10(b)..... Rule 10(b)-5.....	16 19, 20, 21 22, 23, 24 25, 26
New York State Constitution Article V, Section 7.....	18

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v.

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Plans and Exempt Organizations, IRS, BERNARD
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GOLDIN, JAMES REGAN, individually, and as
Trustees of the Teachers Retirement System of
the City of New York and ISAIAH ROBINSON,
individually, as former Trustee of Teachers
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Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES, TRUSTEES
OF THE TEACHERS RETIREMENT SYSTEM

STATEMENT

In this action for declaratory and injunctive relief relating to the investments made by the Trustees of the Teachers Retirement System of the City of New York in securities of the Municipal Assistance Corporation and New York City Serial Bonds, pursuant to the Amended and Restated Agreement of November 26, 1975 between eleven New York City commercial banks and the New York City pension and sinking funds, the plaintiff, a retired teacher, appeals from a judgment of the District Court for the Southern District of New York (Pierce, J.), entered on June 15, 1977,

dismissing the complaint.

Jurisdiction of this action is allegedly based on 28 U.S.C. §1331 and 1343 and the Administrative Procedure Act, 5 U.S.C. §702.

QUESTIONS PRESENTED

1. Do the investments by the Trustees of the Teachers Retirement System in securities of the Municipal Assistance Corporation and New York City Serial Bonds pursuant to the Amended and Restated Agreement dated November 26, 1975 between eleven New York City commercial banks and the New York City pension and sinking funds, violate the constitutional rights of the plaintiff, a retired New York City Teacher, under the contract clause, Article I, Section 10, and under the due process and equal protection clauses of the Fourteenth Amendment?

2. Does Public Law 94-236, which law continues the tax exempt status of the five city retirement systems, including the Teachers Retirement System, violate the contract clause, Article I, Section 10 or the due process and equal protection clauses of the Fourteenth Amendment?

3. Does the plaintiff have standing to assert a cause of action under §10(b) of the Securities Exchange Act of 1934?

4. Assuming, arguendo, that the plaintiff does have standing, do the plaintiff's allegations state a cause of action under Rule 10b-5?

FACTS

(1)

The plaintiff-pro se was employed as a teacher by the Board of Education of the City of New York until 1951 when he retired (B1).^{*} During his employment he made monthly contributions from his salary to the Teachers Retirement System (TRS)(B3). Since his retirement, he has been receiving a retirement allowance of approximately \$3000 a year from the Teachers Retirement Board (B3). The plaintiff, age 69 years of age, pursuant to actuarial tables, has a life expectancy of 13 years (B3). The Board of the TRS consists of the President of the Board of Education, or an authorized representative designated by him, the City Comptroller, two persons appointed by the Mayor, one of whom shall be a member of the Board of Education, and three members of the retirement association elected by the contributors.**

(2)

In June 1975, the New York State Legislature, in response to New York City's dire financial crisis, established the Municipal Assistance Corporation. McKinney's

*Unless otherwise indicated, references in parentheses preceded by a letter refer to pages in the Appellant's Appendices. All other references are to the original papers.

****Administrative Code of the City of New York, §B20-6.0. Decisions by the Board require "[t]he concurrence of the comptroller or of one member appointed by the mayor, of a member elected by the retirement association, and by at least two other members...." Admin. Code §B20-11.0.**

New York Public Auth. Law §3033(1). MAC was authorized, through a series of legislative enactments, to issue more than five billion dollars in notes and bonds §3033(2).

On September 9, 1975, the New York State Legislature passed the New York State Financial Emergency Act for the City of New York. L.1975, Chapters 868-870. After setting forth a statement of findings demonstrating that New York City was in a financial emergency, the Legislature created the New York State Emergency Control Board, a state agency which was given certain supervisory authority over the finances of New York City. L. 1975, Ch. 868, §2(7). The Act also required the Emergency Control Board to develop with city officials a three year plan which would help improve the city's financial condition. L. 1975, Ch. 868, §2(8).

As part of the financial plan, the Legislature authorized the pension funds and the retirement systems to purchase bonds of the Municipal Assistance Corporation in principal amounts as set forth in the statute. L.1975, Ch. 868, §7(2).* The Teachers Retirement System was authorized to purchase \$275,000,000 in MAC bonds. The legislation also declared that MAC securities are reasonable prudent and legal investments for the fund and that no trustee would incur any liability to any person beneficially

*The legislation also "directed" the pension funds to purchase MAC bonds. To the extent the statute sought to compel the purchases it was held to violate Article V, Section 7 of the New York State Constitution. Sgaglione v. Levitt, 37 NY 2d 507 (1975).

interested in a pension or retirement fund by reason of an investment in MAC securities. Retirement & Social Security Law §179, L. 1975, Ch. 868, 6(2).

As a further part of the three year plan, the City Pension Funds (including the Teachers Retirement Fund and the New York City Sinking Funds) and eleven commercial banks entered into an agreement on November 26, 1975 whereby the Pension Funds, among other things, agreed to purchase specified amounts of New York City Serial bonds. The Teachers Retirement Fund (TRF) agreed to purchase \$860 million of city bonds over a three year period (B5).

(2)

This action was commenced on February 16, 1977. The plaintiff, in his complaint, alleges that the Trustees of the Teachers' Retirement system have acted illegally in using TRS assets to purchase "poorly rated, illiquid, high risk New York City obligations" (B5). The complaint further alleges that these purchases of MAC and City securities have reduced the value of the retirement fund to the detriment of the retirees and for the benefit of those currently employed (B5).

The complaint apparently alleges three separate claims for relief. In a cause of action based on 42 U.S.C. §1983, the plaintiff contends that the trustees' investments violated his rights as a beneficiary of the pension fund under Article I, Section 10 of the United States Constitution, and the due process and equal protection clauses (B9).

Plaintiff also contends that P.L. 94-236 is unconstitutional because it continues the tax exempt status of the five city retirement systems participating in the agreement (B5, 14).

The third cause of action alleges that the trustees, in their requests to the Internal Revenue Service for a ruling on the tax-exempt status of the System in light of the November 26 Agreement, did not make full disclosure as required by Section 10(b) of the Securities Exchange Act of 1934.

The relief requested in the complaint includes an injunction enjoining the defendant trustees from further sales of Teachers Retirement System corporate assets to purchase New York City obligations; a declaration that P.L. 94-236 is unconstitutional; a setting aside of the revenue rulings by the Internal Revenue Service; and a determination that the November 26 Agreement is invalid (B16).

On March 4, 1977, the defendant trustees moved to dismiss the complaint on the grounds of failure to state a claim and lack of jurisdiction. On April 8, 1977, the Federal defendants moved to dismiss on the same grounds.

On May 9, 1977, the plaintiff moved for a preliminary injunction. In his supporting affidavit Mr. Kirshner stated that the trustees' purchases of New York City and MAC bonds had harmed his vested interest in the Retirement

System, which he values at \$39,000 (Kirshner, Affid, p. 1). Mr. Kirshner also stated that the purchase of \$860 million dollars of New York City bonds would require the sale of hundreds of millions of sound corporate securities "inflicting irreparable injury of more than \$100 million on the pensioner minority of TRS which owned 87% of the funded assets" (id. at p. 4).

OPINION BELOW

In denying the motion for a preliminary injunction and dismissing the complaint, the District Court discussed at length each of the causes of action asserted by the plaintiff. The Court noted that each of the issues raised in the appeal had been rejected in other cases, citing in particular Sgaglione v. Levitt, 37 NY 2d 507 (1975); Withers v. Teachers Retirement System, 76 Civ. 4474 (S.D.N.Y. Dec. 22, 1976); and Tron v. Condello, 427 F. Supp. 1175 (S.D.N.Y., 1976). The Court stated (A4-9):

"Plaintiff's claim that the actions of the defendants violate the contract clause, Art. I, Section 10, must be dismissed for failure to state a claim. That provision grants to plaintiff no right to seek judicial review of the investment decisions of the Trustees. See Sgaglione, supra, Tron v. Condello, supra, 427 F. Supp. at 1189-90. As Judge Conner observed in that case, to the extent plaintiff claims breach of fiduciary duty, that claim is cognizable in state court.

Kirshner makes an equal protection argument not raised in Tron, to wit, that the actions of the Trustees have discriminated against retired teachers while continuing to favor present employed teachers. The Court concludes that this claim must similarly be dismissed for failure to state a claim, since it is but another method whereby plaintiff seeks to overturn the discretionary investment decisions made by the Trustees. See Sgaglione, supra; Tron v. Condello, supra. Indeed, even if plaintiff's equal protection argument were not foreclosed by the thrust of the state and federal decisions cited above, the claim must fall since the investment decisions of the Trustees have a rational basis and since the distinction between present and retired teachers is not a distinction which would be subjected to strict judicial scrutiny. Rather, under the 'relatively relaxed standard' of judicial review, it is apparent that the actions of the Trustees bear a rational relationship to a legitimate state goal, i e., the protection of the fiscal integrity of the City of New York. See generally Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (per curiam); Dandridge v. Williams, 397 U.S. 471, 485 (1970). Accordingly, each of the three constitutional claims brought against the Trustees must be dismissed for failure to state a claim.

Nor do plaintiff's claims under the federal securities laws state a claim. It is undisputed that Kirshner was not a purchaser or a seller of the securities in issue. Thus he has no standing to assert a private cause of action under Section 10(b) or under Rule 10b-5. Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). Further, plaintiff has no claim under Section 17(a) of the Securities Act since there exists no private cause of action based upon that statute. See Welch Foods, Inc. v. Goldman Sacks & Co., 389 F.Supp. 139 (S.D.N.Y. 1974). Accordingly, all federal claims asserted against the Trustees must be dismissed. The pendent state law claims for breach of fiduciary duty must similarly be

dismissed without prejudice to their assertion in a state court action. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

Plaintiff seeks review of the actions of the federal defendants pursuant to the Administrative Procedure Act, 5 U.S.C. §702. In order to seek review under that section, the plaintiff must be a 'person aggrieved' by agency action. Id. A possible financial loss is not itself a sufficient interest to sustain a judicial challenge to agency action. Abbott Laboratories v. Gardner, 387 U.S. 136, 153 (1967). The agency action challenged here is the approval by an Internal Revenue Service Assistant Commissioner of the investment plans of the Trustees. The agency did not mandate the investment; it simply ruled that the investments would not jeopardize the retirement fund's tax-exempt status. This action is so many levels removed from the interest asserted by the plaintiff that the Court is unable to conclude that Kirscher has standing to challenge it. The A.P.A. does not confer standing upon any person who might suffer financial loss as a result of agency action; rather, the action must directly violate plaintiff's vested legal rights. See Harrison-Halsted Community Group, Inc. v. Housing and Home Finance Agency, 310 F.2d 99, 104 (7th Cir. 1962), cert. denied, 373 U.S. 914 (1963). Plaintiff's 'unadorned speculation' that the agency action will result in a direct injury to him is insufficient to confer jurisdiction under the A.P.A., or indeed, under the Constitution's Article III, Section 2 generally. See Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 44 (1976); Warth v. Seldin, 422 U.S. 490, 505 (1975). Further, plaintiff's other federal claims against the federal defendants are defective for the same reasons that they fail to state a federal claim against the Trustees.

Even if the Court were to proceed to the merits of plaintiff's claim that PL 94-236 is unconstitutional, it is clear that the attack must fail. The statute cannot violate the contract clause, since that section applies to state legislation, not to the enactments of Congress. New York v. United States, 257 U.S. 591, 602 (1922). The due process claim

must fall since, for the reasons stated earlier, Kirshner has no vested property right in controlling the investment decisions of the Trustees. Nor is plaintiff deprived of any property right by reason of the alleged retroactive application of PL 94-236, since the law merely continued the tax exempt nature of the retirement fund, and since the retroactive period was sufficiently short to effect only the then-current fiscal year of the Teachers' Retirement System. Such a brief retroactive application does not serve to invalidate an income tax statute. See United States v. Hudson, 299 U.S. 498, 500-01 (1937). Accordingly, the due process attack on PL 94-236 must fall.

Under the cases cited previously, plaintiff's equal protection attack upon PL 94-236 must fail since the legislation has a reasonable relationship to the legislative goal, i.e., the fiscal preservation of the City of New York. See, e.g., the legislative findings set forth in the New York Seasonal Financing Act of 1975, 31 U.S.C. §1501. Further, the classification between present and retired teachers is not one which requires strict scrutiny of the Congressional action. See Massachusetts Board of Retirement, supra; cf. Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973).

For the foregoing reasons, it is apparent that plaintiff's complaint fails to state any federal claim upon which relief can be granted. Even under the less stringent standard applied to pro se complaints, it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see Haines v. Kerner, 404 U.S. 519 (1972) (per curiam). The motions to dismiss are hereby granted. Plaintiff's cross-motion for a preliminary injunction is denied as moot. The complaint is dismissed."

APPLICABLE STATUTES

Public Law 94-236 passed on March 19, 1976, provides as follows:

"Be it enacted b. the Senate and House of Representatives of the United States of America in Congress assembled, That (a) any pension plan or trust which, on December 5, 1975, was a party to the amended and restated agreement of November 26, 1975, set forth on pages S21308, S21309, and S21310 of the Congressional Record published on such date, and any trust forming a part of such a plan, shall not be considered to fail to satisfy the requirements of section 401(a) of the Internal Revenue Code of 1954, and shall not be considered to have engaged in a prohibited transaction described in section 503(b) of such Code, merely because such plan or trust does any or all of the following:

- (1)(A) enters into such agreement or agrees to an amendment of such agreement;
- (B) forebears from any act prohibited by such agreement;
- (C) acquires or holds any obligation the acquisition or holding of which is provided for by such agreement;
- (D) makes any election provided for by such agreement;
- (E) executes a waiver of any requirement of such agreement;
- (F) after the expiration of such agreement, holds any obligation acquired or held pursuant to such agreement; or
- (G) performs any other act provided for by such agreement:

(2) on or after August 20, 1975, and before January 1, 1979, considers, for purposes of determining investments to be made by the plan or trust, the extent to which such investments will--

(A) maintain the ability of the city of New York--

(i) to make future contributions to the plan or trust.

and

(ii) to satisfy its future obligations to pay pension and retirement benefits to members and beneficiaries of such plan

or trust, and

(B) protect the sources of funds to provide retirement benefits for members and beneficiaries of the plan or trust; or

(3) after December 31, 1978, considers, for purposes of determining whether to retain investments held on December 31, 1978, the factors enumerated in paragraph (2).

For purposes of paragraph (1), the acquisition or holding of any obligation of the Municipal Assistance Corporation for the city of New York on or after August 20, 1975, and before November 26, 1975, shall be considered an acquisition or holding provided for by such agreement.

(b) In the case of--

(1) any amendment to the agreement described in subsection

(a) which relates to the application of the factors set forth in subsection (a) to the requirements of section 401(a) or 503(b) of the Internal Revenue Code of 1954 and which is adopted after December 5, 1975, and

(2) any waiver of any requirement by a plan or trust after December 5, 1975, such amendment or waiver shall take effect for purposes of subsection (a) on the date on which a copy of such amendment or waiver is submitted directly to the Secretary of the Treasury; except that, if the Secretary determines, not later than 30 days after such date of submission (or if later, the date of the enactment of this Act) that the taking effect of such amendment or waiver for purposes of subsection (a) is inconsistent with the considerations set forth in subsection (a) is inconsistent with the considerations set forth in subsection (a)(2), such amendment or waiver shall not be deemed to have been effective for any period for purposes of subsection (a). No amendment to the agreement which has the effect of extending the expiration date of the agreement to a date later than December 31, 1978, shall take effect for purposes

of subsection (a).

(c) The trustees of each pension plan or trust described in subsection (a) shall furnish a copy of the annual report filed by such plan or trust with the New York State Insurance Department for each fiscal year of the plan or trust beginning after June 30, 1975, and ending with the first fiscal year in which there are no obligations with respect to which subsection (a) applies, to the Secretary of the Treasury not later than 30 days after the date such report is filed with the New York State Insurance Department, and shall furnish such additional reports and other information as the Secretary of the Treasury may reasonably require. A copy of each such report shall be furnished by the Secretary of the Treasury to the chairman of the Committee on Ways and Means of the House of Representatives and the chairman of the Committee on Finance of the Senate.

(d) The Secretary of the Treasury or his delegate is authorized to prescribe such regulations as may be necessary to carry out the purposes of this Act.

(e) This Act shall be effective on and after August 20, 1975.

Approved March 19 1976.

POINT I

THE INVESTMENTS BY THE TRUSTEES OF THE TEACHERS RETIREMENT SYSTEM IN SECURITIES OF THE MUNICIPAL ASSISTANCE CORPORATION AND NEW YORK CITY SERIAL BONDS, PURSUANT TO THE AMENDED AND RESTATED AGREEMENT, DATED NOVEMBER 26, 1975, DO NOT VIOLATE THE PLAINTIFF'S CONSTITUTIONAL RIGHTS UNDER THE CONTRACT CLAUSE, ARTICLE I, SECTION 10 AND UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

(1)

Article I, Section 10 prohibits state legislative enactments which impair contractual obligations. As was noted by the District Court in this case, the plaintiff is relying on this section to seek judicial review of the

investment decisions of the Trustees (Opin, p. 4).

The trustees' investment choices are matters of discretion and do not come within the in scope of Article I, Section 10. Tron v. Condello, 427 F. Supp. 1175 (S.D. N.Y., 1976). The New York State Financial Emergency Act for New York City, Chapter 868-870 of the Laws of 1975, had required the trustees of the various retirement systems to make specific investments from the fund in MAC securities. On September 29, 1975, so much of L. 1975, ch. 868, §7, as directed pension funds to invest in MAC obligations was declared unconstitutional by the New York Court of Appeals as a violation of the nonimpairment clause of the New York State Constitution, Article V, Section 7 because it removed discretion from the trustees. Sgaglione v. Levitt, 37 NY 2d 507 (1975). Subsequent to that decision, the trustees of the various retirement systems, in their discretion, voted to purchase MAC securities. This exercise of discretion pursuant to Section B20-31.0 of the Administrative Code of the City of New York, has not been interfered with by the Courts.* See Westchester Chapter, Civil Service

*Section B20-31.0 of the Administrative Code provides that the trustees "shall have exclusive control and management of such funds, and shall have full power to invest the same ...; and ... shall have full power to hold, purchase, sell, assign, transfer or dispose of any of the securities and investments in which any of funds ... have been invested"

MAC and New York City Serial Bonds are "legals," i.e., permissible investments for fiduciaries generally and pension fund trustees in particular. Admin. Code §B20-31.0; Banking Law §235(4); L.1975, ch. 868, §1; and §179(1) of the Retirement and Social Security Law, as amended by L.1975, ch. 868, §6.

Employees Assoc., Inc. v. Levitt, 50 AD 2d 1105 (3rd Dept., 1975), affd. on certified question 37 NY 2^d 519 (1975); Simpson v. Mitchell, Index No. 20061/75, December 1, 1975, N.Y.L.J., p. 8, cols. 4, 5 (Sup. Ct., N.Y. Co.), affd. 53 AD 2d 590 (1st Dept., 1976). Similarly, the trustees decided in their discretion to enter into the November 26 Agreement.

(2)

The plaintiff argues that the trustees' discretionary investments in the MAC securities and New York Serial bonds deprive him of his constitutional rights under the due process and equal protection clauses of the constitution. This argument has already been rejected in another case. See Tron v. Condello, 427 F. Supp. 1175, 1189-1190 (S.D. N.Y., 1976). Plaintiff's vested interest in his pension does not give him the right to regulate the investment decisions of the trustees of the Teachers Retirement System.

With respect to the due process claim, plaintiff's property right under due process is determined by state law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). As we noted above, the New York Court of Appeals in Sgaglione v. Levitt, 37 NY 2d 507, 513 (1975), held that a pensioner cannot request the courts to assess the market worthiness of securities in which trustees may invest.

The plaintiff's vested interest is in receiving his retirement allowance. Plaintiff and all the members of

the purported class are currently receiving their retirement allowances.

Plaintiff's claim is based on an alleged breach of the trustees' fiduciary duty in investing in MAC securities and New York City Serial Bonds. This is a state law claim which does not rise to a constitutional violation. In Paul v. Davis, 424 U.S. 693, 700-701 (1976), the Supreme Court noted that not every state law tort establishes a basis for a cause of action under 42 U.S.C. §1983. Neither does the Court have jurisdiction under diversity of citizenship since plaintiff and the defendant trustees are all citizens of New York State.

The state law cause of action for breach of the fiduciary duty may be considered by a federal court under the doctrine of pendent jurisdiction. Pendent jurisdiction would not be appropriate in the instant case. We have shown in part above and as we will show below, none of the plaintiff's federal claims have any merit. Under such circumstances, this state law claim should be left for resolution by the state courts. See United Mine Workers v. Gibbs, 383 U.S. 715, 726-727 (1966); Women in City Government United v. City of New York, Docket No., 74-2352 slip. opin., at pp. 6139, 6148, decision dated September 28, 1977.

Even if the federal court were to rule on this state law claim, the claim should be dismissed on the merits. In Sgaglione v. Levitt, 37 NY 2d 507, 513 (1975),

the New York Court of Appeals stated that a pensioner cannot request the courts to assess the market worthiness of securities in which the trustees may invest.

In Simpson v. Mitchell, supra, Index No. 20061/75, December 1, 1975, N.Y.L.J., p. 8, cols. 4, 5 (Sup. Ct., N.Y. Co.), affd. 53 AD 2d 590 (1st Dept., 1976), the plaintiff, in an action alleged, among other things, that the investments by the trustees of the Teachers Retirement Fund in MAC securities in 1975 and 1976 was a breach of their fiduciary duty. The Supreme Court, citing, Sgaglione v. Levitt, dismissed the complaint. The Appellate Division affirmed the dismissal of the complaint on the opinion of the Supreme Court justice.

Plaintiff citing the equal protection clause, argues that the actions of the Trustees have discriminated against retired teachers while continuing to favor presently employed teachers.

The investments by the Teachers Retirement System in MAC Securities and New York City Serial bonds were necessary to avert default by the City. A default by the City would have an adverse effect on the Teachers Retirement System. All members of the system would have been affected. These points are emphasized repeatedly in the February 23, 1976 report of the Committee on Ways and Means, House of Representatives on H.R. 11700, a bill which permits the trustees of the various New York City pension funds to invest in New York City Serial Bonds without losing the

System's tax exempt status.

The purchase of the New York City Serial Bonds by the pension funds was a key part of the plan to avert default (Report, pp. 14, 22). In his testimony before the Committee, Jack Bigel, pension consultant to the Municipal Labor Committee, testified that in the event of the City's bankruptcy, the Pension Funds would be able to meet their obligations primarily to the retired members for a period not in excess of 6 to 8 years (Report, pp. 30, 32-33), Bernard Goldberg, a trustee of the New York City Teachers Retirement System, also testified that the Pension Funds' purchases of New York City obligations protected the interests of the present and future beneficiaries of the retirement system (Report, p. 42).

The portion of the House Ways and Means Report which indicates that the present fund, without further contributions, would be exhausted in eight to ten years assumes that all of the fund would be paid to retired members. This assumption is not justified. Article V, Section 7 of the New York State Constitution (impairment clause) also protects the rights of those people who have contributed to the fund but who have not yet retired. If the City was compelled to declare bankruptcy, some provision would have to be made for the members who have not yet retired. As a consequence, the fund would not be able to pay the retired members even for the short eight year period. The investments by the trustees challenged here

enable the Funds to assure that the retired members will be able to receive the entire pensions to which they are entitled.

POINT II

P.L. 94-236, WHICH LAW CONTINUES THE TAX EXEMPT STATUS OF THE FIVE CITY RETIREMENT SYSTEMS PARTICIPATING IN THE AMENDED AND RESTATED AGREEMENT DATED NOVEMBER 26, 1975, IS CONSTITUTIONAL.

P.L. 94-236 provides that the five pension funds, including the Teachers Retirement System, will not lose their tax exempt status because of their participation in the Amended and Restated Agreement dated November 26, 1975. Pursuant to the agreement, the funds agreed to purchase specified amounts of New York City Serial Bonds.

The District Court interpreted the plaintiff's complaint to attack the statute on three grounds: a violation of the contract clause, Article I, Section 10 and violation of the due process and equal protection clauses.

The District Court properly rejected the claim based on the contract clause because Article I, Section 10 is only applicable to State legislation, citing New York v. United States, 257 U.S. 591, 602 (1922) (opin., p. 7).

Plaintiff has not been deprived of any property without due process. As we noted above, he is continuing

to receive the full amount of his pension pursuant to the regular schedule.

The District Court indicated that the plaintiff was also alleging a deprivation of due process based on the retroactive application of PL 94-236 (Opin., p. 7). P.L. 94-236 did not affect any rights retroactively. It merely continued the tax exempt status of the five pension funds. Even if the law could be construed so as to affect a right retroactively, where the period of retroactivity is short there is no violation of the constitution. See United States v. Hudson, 299 U.S. 498, 500-501 (1937).

PL 94-236 does not violate the equal protection clause. The challenged statute relates to the management of a System's assets, an economic matter, which is not a fundamental right. The retirees do not constitute a suspect class. The appropriate standard for reviewing P.L. 94-236 is the rational relationship test. Tron v. Condello, 427 F. Supp. 1175, 1192 (S.D.N.Y., 1976).

The legislative classification involved in the instant case is directly related to the purpose of P.L. 94-236. As we discussed in Point I, the Report of the House Ways and Means Committee dated February 23, 1976 indicates that P.L. 94-236 was a necessary part of the financial plan to save the City of New York from bankruptcy. On December 9, 1975, the President had signed the New York City Seasonal Financing Act of 1975, authorizing the Secretary of the Treasury to loan up to \$2.3 billion at

any one time to the City of New York in order that it might maintain its essential services (Report, p. 2). The Seasonal Financing Act was enacted with the understanding that the November 26 1975, agreement involving the commercial banks and New York City pension and sinking funds would be implemented (Report, p. 2). Pursuant to the agreement, the five City pension funds agreed to purchase approximately \$2.5 billion through the fiscal year 1978. The purchase of these securities without P.L. 94-236 might violate Sections 401(a) and 503(b) of the Internal Revenue Service resulting in the loss of tax exempt status, with the Pension Funds required to pay an immediate tax on current assets and contributions to the plans (Report, p. 4). The possibility of this huge tax would discourage the pension plans from participating in the November 26 Agreement and without their participation the entire financial plan would have been destroyed. The pension systems and trust funds not participating in the November 26, 1975 Agreement are properly excluded from P.L. 94-236 because their investments are not related to the program to save the City from bankruptcy nor are they dependent upon annual City contributions.

POINT III

THE PLAINTIFF DOES NOT HAVE STANDING TO ALLEGE A CAUSE OF ACTION UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934. PLAINTIFF IS NOT A PURCHASER OR A SELLER OF THE SECURITY, NEW YORK CITY BONDS WHICH PURCHASE IS BEING CHALLENGED UNDER THE ACT. IN ANY EVENT, PLAINTIFF'S CAUSE OF ACTION SHOULD BE DISMISSED FOR FAILURE TO SHOW ANY MATERIAL MISREPRESENTATION OR FAILURE TO DISCLOSE RELEVANT FACTS.

(1)

Plaintiff's claim for relief under Section 10(b) of the Securities Exchange Act was properly dismissed because the plaintiff was not a purchaser or seller of the New York City bonds, which purchases by the Trustees are being challenged in this lawsuit.

In Birnbaum v. Newport Steel Corp., 193 F. 2d 461 (2d Cir., 1953), this Court held that Section 10(b) of the Securities Exchange Act was aimed only at fraud perpetrated upon a buyer or seller of a security as defined in the Act. It was necessary under the statute for the act of fraud to operate upon the person in connection with the purchase or sale of such security. This principle has been reiterated by the Supreme Court and recent decisions of this Circuit. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 730 (1975); Ernst & Ernst v. Hockfelder, 425 U.S. 185, 207 (1976); Haberman v. Murchison, 468 F.2d 1305, 1311 (2d Cir., 1972). Greenstein v. Paul, 400 F. 2d 580, 581 (2d Cir., 1968).

There is serious doubt whether plaintiff's interest in the pension fund is a security within the meaning of Section 10(b) of the Security and Exchange Act. In Robinson et al. v. United Mine Workers of America Health, and Retirement Funds, et al., D.C., Dist. Columbia, Civil Action 77-0698, Federal Securities Law Reports ¶96, 118, the Court held that the interest of a coal miner in United Mine Workers Benefit Plan and Trust is not a security within the meaning of 10(b) of the Securities Exchange Act of 1934. See Riphey v. Denver United States National Bank, 260 F. Supp. 704, 713-714 (D.Col., 1966) [beneficiary of a trust does not have interest within the meaning of 10(b)]. See also, United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975) (shares in cooperative apartment are not governed by the securities laws).

In contrast to Robinson and Riphey, the Court of Appeals for the Seventh Circuit in Daniel v. International Brotherhood of Teamsters, 46 U.S.L.W. 2119 (August 30, 1977) (cited in App. Br., p. 13), has held that a union member's interest in an involuntary pension plan funded solely by employer contributions is a security covered by Section 10(b) of the Securities Exchange Act. Daniel appears to be an unwarranted extension of the term security as used in Section 10(b). But even if the interpretation of the term security by the Court of Appeals in Daniel is correct, the plaintiff in the instant case would still lack standing to sue.

In Daniel, the plaintiff had worked for employers covered by the same local, Local 705, for a total of 22 years. His employment was uninterrupted with the exception of a four month absence resulting from an involuntary lay-off in 1960. As a result of the absence, the employee was denied benefits under the pension plan, which had a twenty year vesting period and a requirement of continued employment with no break in service. The employee alleged that he had been injured as a result of misrepresentations cognizable under the federal securities laws. The misrepresentations consisted of the defendants' (including the Local, the International, the Pension Fund and its trustees) misleading statements of material fact and their omitting to disclose material facts regarding the length and continuity of service requirements. The complaint alleged that as a result of these misrepresentations the plaintiff had been injured.

In Daniel the alleged fraud, as required by Section 10(b), was in connection with the sale of the security, the employees' interest in the pension fund. In the instant case there is no allegation of fraud when the plaintiff "purchased" his interest in the pension fund more than 25 years ago. The alleged fraud in this case occurred in the purchases of MAC securities and New York City Bonds within the last year by the Trustees. Even if plaintiff's interest in the Pension Fund is a security within the meaning of 10(b), the alleged misrepresentations were not

made in connection with the sale of that "security" to him. In addition, unlike Daniel, the plaintiff has not suffered any injury. As we have noted above, the full amount of his pension payments are being made to him without interruption.

Apart from the lack of standing, the plaintiff's complaint under Rule 10b-5 should be dismissed on the merits because he failed to show a material misrepresentation or a failure to disclose material facts. The conditions surrounding the sale of MAC and New York City bonds to the pension funds had been fully disclosed. In the Amended and Restated Agreement of November 26, 1975, in which the Pension Funds, among others, agreed to purchase certain securities, it is provided that the City, upon the request of a Pension Fund, must furnish to the Fund "a report of the essential facts of the City in the form promulgated by the State Department of Audit Control." Agreement, paragraph 7(e). In connection with each purchase after February 1, 1976, the City shall deliver to each Pension Fund so requesting an official statement which shall include the "current status of the city's financial plan as required and approved by the Emergency Financial Control Board" (id.).

The decision of the trustees to purchase City securities was a proper one. It was made with the knowledge that the failure to make such purchases would make a bad situation worse. The testimony before the Committee on Ways

and Means, House of Representatives on PL 94-236, on February 23, 1976, discussed above, demonstrates that these purchases by the Pension Funds, including the Teachers Retirement System, were necessary to preserve the pension system for the retirees and the active employees.

At most, plaintiff's claim is based on a breach of fiduciary duty. This does not constitute a cause of action under Rule 10b-5. See Santa Fe Industries Inc. v. Green, 430 U.S. 462, 477 (1977).

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED.

November 16, 1977.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Defendants-
Appellees, Trustees of the
Teachers Retirement System,
of the City of New York.

JAMES G. GREILSHEIMER,
L. KEVIN SHERIDAN,
LEONARD KOERNER,
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Pro Se
AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Stinky Burch being duly sworn, says that on the 18 day of November, 1977, he served the annexed Plaintiff's Complaint upon Albert Kershner Esq., the attorney for the Defendant herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 98 Van Brunt St. in the Borough of Brooklyn, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

18 day of Nov, 1977
Bruce S. Garner
BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Stinky Burch

Form 323-60M-1126054(77) 346

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

Carolyn Jerner being duly sworn, says, that on the 18 day of Nov, 1977 at No. One St Andrews in the Borough of Man in The City of New York, he served a copy of the annexed Brief upon Albert Fisher Esq., the attorney for the Southern District in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 18 day of Nov, 1977

Bruce S. Garner
BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Carolyn Jerner